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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re I.G., a Person Coming Under the Juvenile Court Law.	
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. J.B. et al., Defendants and Appellants.	A122638 (Alameda County Super. Ct. No. HJ08010297)

Mother and father appeal from a juvenile court order establishing jurisdiction over their prematurely born infant, I.G., and removing her from father's physical custody. Although the record discloses inappropriate behavior by father while the infant remained hospitalized, and other indications that the situation may bear watching, neither parent has engaged in conduct that significantly threatens the infant's safety, and both have displayed exceptional concern for the well-being of their newborn child. Although the trial court's findings are entitled to great deference, the record does not contain evidence sufficient to support jurisdiction in this case.

Background

I.G. was born eight weeks prematurely at St. Rose Hospital in Hayward. She was promptly transferred to Children's Hospital Oakland (Children's Hospital) because she was "medically fragile," had breathing problems and required special feedings. She

remained at Children's Hospital until June 13, 2008, when mother and father had her transferred to Lucille Packard Children's Hospital in Palo Alto because they were unhappy with the services at Children's Hospital. Shortly before I.G. was to be released from the hospital, on July 3, a petition was filed under Welfare and Institutions Code section 300, subdivision (b)[1] alleging that the parents are not capable of providing I.G. with the care she needs, and that they had interfered with her medical treatment. The social workers' concerns initially focused on father's intemperate responses to what he regarded as inadequacies in the treatment of the infant, the fact that mother and father had not received training to care for the infant's special needs, and on a perceived threat of domestic violence.[2] After the parents received training in the care of I.G., the social workers' focus shifted largely to the mental health of the two parents. Ultimately the juvenile court, though recognizing this as "a difficult and unusual case in that we have here two parents who are clearly extraordinarily devoted to their new baby," expressed its concern about what might happen to the minor without agency supervision, asserted jurisdiction and ordered that I.G. reside with mother, provided that father not reside in the home.

Original petition

The July 3, 2008 petition alleged that I.G. is "medically fragile and requires special care and attention that the parents are not able to meet without on-going medical and social intervention . . . ." The petition alleges that I.G. has breathing problems, that she is at risk for failure to thrive, requires special feedings and needs public health nursing visits and genetic testing for a cyst on her ovary. The petition further alleges (1) that the parents had not cooperated with medical and social services staff and, specifically, that father had been "banned from Children's Hospital, Oakland, after not

[1] Further statutory references are to the Welfare and Institutions Code.

[2] Mother and father were living together but not married at the time of the detention hearing.

agreeing to treat staff with respect"; (2) that I.G. was transferred to a different hospital because "father refused to work with staff at Children's Hospital"; (3) that "father refused to participate in hospital training regarding care of the minor"; (4) that "mother failed to attend education training relating to the minor's medical needs"; (5) that father would not cooperate with social services regarding I.G.'s discharge from the hospital, (6) that father would "not allow anyone in his home that does not speak Spanish, including a public health nurse, although father and mother speak fluent English"; (7) that mother had ended two phone calls with a nurse by hanging up; and (8) that mother was "kicked out of Lucille Packard Hospital after [she] became irate and used profanity at hospital staff."

Finally, the petition alleges that father is "emotionally unstable, and his behavior interferes with the father's ability to provide care for the minor . . . ." Examples were that father had been banned from Children's Hospital for failure to treat staff with respect; that "father grabbed a nurse attending to the minor"; that "father pulled the tape of the NG (breathing tube) in the minor's nose that could have caused the minor to aspirate"; that father was verbally abusive to mother; that father "told hospital staff that because the mother did not initially want the minor transferred from Children's Hospital, he kicked the mother out of their home"; and that maternal grandparents had called the police "regarding the father's behavior towards the mother."

Detention Hearing

A detention report was filed on July 7, the day of the detention hearing. The report recommended that I.G. be detained. It states that a social services hold was placed on I.G. at Lucille Packard Children's Hospital on June 30, and that she had been placed at a "shelter care home" on July 4. It repeats the allegations made in the petition and adds that father had at one time forbidden mother and maternal grandmother from receiving medical training to care for I.G., stating that "he is the only person [] who will make decisions for" I.G. The report additionally describes parents' relationship as "tumultuous" and states that there is a "concern for possible domestic violence." Maternal grandparents were reported to have indicated that "mother has a learning disability that may hamper

her ability to care for the minor, as her comprehension is poor." Parents' home is described as "neat and clean. The parents have a bed, dresser, and other baby supplies for the minor. A family strength is that the parents appear to care very much about their daughter's well-being." A narrative of a conversation with the social worker from Children's Hospital essentially repeats the allegations: I.G. was premature and has trouble breathing; father is uncooperative with hospital staff; there are concerns about domestic violence because father has been verbally abusive to mother. "The concern is that the home environment will be too stressful for this medically fragile child to thrive and that the parents both need to learn the specifics of caring for the child."

The detention report also observes that on June 26, father told the child welfare worker that he would not allow a public health nurse into his home if she did not speak Spanish, although both mother and father speak fluent English. Father began speaking to the social worker in Spanish during this conversation. However, the report also indicates that father appears to have agreed to allow the agency's nurse into the home if he could not locate a Spanish speaking nurse.

The report indicates that on June 30, Judy Jones from a program called Every Child Counts called the child welfare worker to inform her that father had called the program looking for a home visiting nurse. Father was told that "they do not see children born at St. Rose Hospital," at which point father asked Jones to speak with mother. Jones reported that mother then hung up the phone. Jones called mother back, "thinking the line dropped," and mother "told her that her services were not wanted . . . ."

Further, according to the report, on July 1, a social worker at Lucille Packard Children's Hospital reported "concerns that the mother does not seem to grasp the feedings and it has been charted that during feedings, the mother tends to space out and not pay attention. It was also noted that the mother missed several appointments of the teachings. There is a belief that the mother has not fully grasped the requirements of the baby and equally as important, a concern that medical and other professionals will be denied access to baby."

The report states that on July 1, 2008, the child welfare worker received a telephone message from a hospital social worker. She stated that "the mother had to be removed from the hospital because she became verbally abusive to hospital staff and then was said to have lunged at the nurse director." The report goes on to state that "parents appear to show little capacity to care for their daughter," but the following sentence states that mother is "connected to her child," visited with I.G. "almost daily, with the exception of when the mother had a cold," had completed some instruction concerning the care of her daughter, "including watching an infant CPR video and she also practiced using the oxygen machine." Mother is reported to have a learning disability "and does not comprehend everything. . . . [M]other's behaviors seem to be unpredictable. At times, she can be cooperative and comprehend what is being explained to her and suddenly, her personality seems to change and she becomes rude and unable to take in or comprehend new information. She behaves in a very passive manner in regards to the father's wishes, even when it is not in the best interest of her daughter's medical needs. [¶] The father has been described as rude, threatening, and belligerent to [Children's Hospital] staff and verbally abusive to the mother."

On July 7, 2008, the court found removal necessary under section 319, subdivision (a).[3] stating that "[c]ontinuance in the home of the parent or guardian is contrary to the child's welfare," and that "[r]easonable efforts have been made to prevent or eliminate the need for removal of the child from his or her home." The July 7 order

[3] As relevant here, section 319 provides: "(a) At the initial petition hearing, the court shall examine the child's parents, guardians, or other persons having relevant knowledge and hear the relevant evidence as the child, the child's parents or guardians, the petitioner, or their counsel desires to present. . . . [¶] (b) . . . The court shall order the release of the child from custody unless a prima facie showing has been made that the child comes within Section 300, the court finds that continuance in the parent's or guardian's home is contrary to the child's welfare, and any of the following circumstances exist: [¶] (1) There is substantial danger to the physical health of the child or the child is suffering severe emotional damage, and there are no reasonable means by which the child's physical or emotional health may be protected without removing the child from the parent's or guardian's physical custody."

directed that the child be removed from the custody of her parents, but on the following day the court ordered I.G. *not* be detained. The court ordered that she be "released to mother on condition that she reside in home of maternal grandparents and not leave child in care of anyone who has not received training as indicated by child's pediatrician." Father was permitted supervised visits, and the agency was given discretion to remove the requirement for agency supervision.

Jurisdictional and dispositional hearing

The jurisdictional/dispositional report dated July 17 repeats the allegations that were made in the detention report and adds additional allegations concerning subsequent events. It states that since the detention hearing, the social worker had been unable to "obtain information from Lucille Packard Hospital regarding what the required training would be for the father" and that father had since obtained CPR training. Mother had been "given instruction regarding special feedings for the minor." "[M]other reports that the minor is eating and sleeping well." Mother reported that her relationship with father had been "strained" since the birth of I.G., but "denied any domestic violence." The report cites as concerns that "mother's passivity makes it appear that she can not stand up to the father when it comes to advocating for the best interest of her daughter's medical or emotional well being," and that "[m]other admits and reports that the father is constantly rude to her, belittles and curses at her, as well as tells her that she is worthless and stupid." "Mother denies that her husband is physically abusive towards her, but based on father's relentless emotionally abusive treatment towards the mother in front of medical professionals, this has not been ruled out completely."

A social worker from the hospital reported that father "was verbally abusive towards her, calling her, 'a piece of shit,' and [that father stated] that she was rude and disrespectful to him." She also "could state that [father] had numerous opportunities during the minor's hospitalization at Packard[] to obtain whatever training would be required for care for the minor at home, but he refused to do so." The hospital social worker stated that "while the minor was hospitalized, [father] interfered with the minor's

Medi-Cal status, by switching the type of Medi-Cal she had. [Father] was adamant not to accept the name of [the] hospital advocate for Medi-Cal, who could help the family. [The social worker] states that she was also concerned that the mother refused to give[] written authorization to the Medi-Cal advocate to contact an eligibility worker regarding the minor's Medi-Cal. The mother refused to sign, reportedly after consulting with the father over the issue." The hospital social worker also stated that "she became concerned about father's volatility, in that he at times appeared to go 'from zero to sixty' when frustrated." Mother and father were receiving counseling "regarding issues involving children, co-parenting, and the impact of their relationship on the child." The counselor "reported that the parents seem motivated to engage in counseling and that they seem to love their child."

On August 19, 2008, the court continued the jurisdictional hearing to September 4. The hearing proceeded on the 4th and was continued on September 8. In an addendum report filed on September 3, the agency reported that I.G. "continues to be in the care of her mother at the maternal grandparents' home. The minor is seen regularly in the home by Alameda County public health nurse Nancy Roth, as well as medical staff at Stanford Hospital. Ms. Roth reports that the minor is developing well and the mother is very appropriate in caring for the minor. Ms. Roth notes that the mother is very stressed regarding her family situation, in that the mother does not wish to reside in the home of the maternal grandparents." I.G was scheduled to have surgery for the cyst. The social worker had not had contact with father since the last hearing.

At the hearing on September 4, the child welfare worker testified that she had received records from a mental health rehabilitation program that father checked himself into in March 2008, where father was diagnosed with post traumatic stress disorder, major depression, and schizoaffective disorder. She stated that father's behavior that had been reported since I.G.'s referral "could be" related to these diagnoses. She had recommended that father have a psychological assessment done. "[T]he concern with myself and Social Services has been getting more information about the father's

emotional stability given the referrals that got us into the case regarding the father's behavior since his daughter's birth." However, she stated, "I think the parents have been positive and appropriate in caring for their child." Nevertheless, she recommended that I.G. be placed with mother but not with father. This was because "For me, what's missing is really not having enough information about the father's mental health component, not knowing what his—if he's in treatment, what the follow-up—what the recommendations are . . . if he's had previous hospitalizations, what prompted the hospitalization in March. I don't have any information about what kind of treatment the father's getting. So I can't—you know, that's a big piece for me."

The agency's child welfare worker testified that on July 17 the court had ordered the agency to conduct a domestic violence assessment and that pursuant to that order on August 11,she gave a referral for a domestic violence assessment to father's attorney, but as of September 4, father had not followed up on it to her knowledge. However, the child welfare worker also testified that the emergency response worker who performed the initial investigation from approximately May through June indicated that there were no domestic violence issues.

She was asked, "If the court were to return [I.G.] to her mother and father back in the parents' home, jointly today, what, in your assessment, would be the immediate risk to [I.G.] to her safety or her physical or emotional well-being?" The social worker answered, "Well, number one, I don't know—in the letters that I've seen today, the father and mother seem to be cooperative with the medical community in terms of going to visits, going to appointments, medical appointments. But I would have concerns about the father's willingness to allow others in the home to see [I.G.], to monitor [her], to allow CPS in the home to be able to check on the well-being of the child because, thus far, I haven't really seen that level of cooperation from the father." On cross-examination she was asked, "So you would not be concerned, then, about the father's care of the child in the home, medical care?" She responded, "Thus far, no." She testified that she had never seen father behave in a violent manner. Asked if father could feed and clothe I.G.

and take care of her daily needs, she answered, "Yes." Asked if he could "take the child to the medical appointments," she responded, "He could, if he wanted to cooperate, yes." She was then asked, "Well, he has in fact been attending all the appointments, as far as you know?" She responded, "Attending them, yes. But you say, 'take.' I don't know. The child's not in his care, so I don't know." She was then asked, "you do not have any concerns about the father mistreating or physically abusing this child, do you?" She answered, "Thus far, no. But, once again, I don't know the father's propensity for violence. I don't know his mental health issues, so it's hard for me to predict that. But, thus far, no." She conceded that she had not seen any propensity for violence on the part of the father towards I.G. and also that she had not seen father be violent towards mother. She allowed that any concern she had about I.G. being in an environment that was potentially violent could be alleviated by having someone from the agency visit the child "at least every other week." She also stated that I.G. was being seen regularly by medical providers.

The following colloquy took place: "So there's going to be lots of people that are going to be visiting the home and are going to be looking very closely at the child in terms of her medical condition and, obviously, any other issues that they see, correct?" "If allowed in the home, yes." "So your concern is if the father does not allow them in the home, then there would be a problem?" "Right, no access, yes." "If the father would say that, yes, they could come into the home, then that would alleviate your concerns?" "Yes and no. If allowed in the home and if the home environment is conducive to people wanting to go into the home. One, it has to be accessible and it has to be a person that needs to cooperate with someone who needs to have access to the child." She testified that father told a nurse at Stanford Hospital that she was welcome in his home at any time.

As to the specific allegations in the petition, the social worker, who had prepared the petition, stated that she did not know if I.G.'s breathing problems were ongoing, stated that I.G. was now "growing and thriving," that she did still require special feedings

but that there were no issues with her receiving them, and that I.G. was scheduled for surgery to remove the cyst. The social worker stated that she had no concerns about mother. She testified that the allegation that on June the 26, "the father refused to cooperate with the Social Services Agency regarding hospital discharge planning for the minor" was based on the fact that father requested an evening rather than a noon discharge because mother and father were scheduled to attend a training session at noon.

A note from a hospital social worker on June 27, 2008, 11 days before I.G. was discharged, states that "we have not had any incidents thus far until today." She noted that father had not been at the hospital very often because it was difficult to arrange transportation. She also observed that there had been increasing tension between the family and the agency, and that father had tried to engage the hospital social worker in the dispute. "I have had limited contact with him, but extensive contact with mother, who has been easy to work with. Dad is upset because he was told that he must go through CPS at discharge . . . . Dad has left me six voicemails trying to engage and manipulate me and I did not return his phone calls . . . . Today, when I phoned mom to relay some information, she put dad on the phone and he was extremely inappropriate with me. He cursed and screamed at me and there was no way to calm him, as he was irrational and circular in his reasoning. I immediately informed his CPS worker what happened and she stated that she was trying to protect the hospital from his behavior because that and worse was demonstrated at Oakland Children's."

After the social worker's testimony, mother and father both moved for a "directed verdict," arguing that "I don't think that the agency has shown the need for the minor to be made a dependent of the court. There's been no showing that there's a likelihood of extreme hardship to this minor, substantial risk that the child will suffer serious physical harm or illness. So I don't think they have met their burden at this point and I'm asking that you dismiss the case." The court denied the motion, stating, "I find that there is substantial evidence, actually, that the minor is at risk."

At that point, mother testified. She stated that father had never hit her or threatened to hit her, nor had he done anything to make her fear for her safety. She testified that she had recently called the police because "I wanted to take the baby's clothes and the baby's things from the apartment" that she and father shared, and that he would not let her take them because he had purchased them. She stated that father had attended probably more than 10 of I.G.'s medical appointments, that she had seen him caring for her, feeding her, changing her diapers and clothes, and that he had never been "inappropriate" with her and had never taken "any action that . . . would harm" I.G.

Mother testified about the incident in which father felt the nurse had put tape too close to I.G.'s eye. "[H]e asked her to take it off and he asked for her to call the charge nurse, and she refused to do that." She also said that although their social worker had told them they could sleep in the parents' lounge while I.G. was in the hospital, very early in the mornings a security guard came in and yelled at them and other parents also using the lounge, telling them they could not sleep there. Father argued with the security guard, they eventually met with the security supervisors and their social worker, and they were then told that they could no longer sleep in the lounge. She did not see any other disputes between father and the security staff.

Father testified to the reasons for which he was dissatisfied with the services at Children's Hospital. He and mother were not informed by hospital staff when I.G. had a hernia, when she "desaturated" on five occasions, when she "stopped breathing for 20 seconds," or when she was to be discharged. The parents learned of the desaturation incidents from their CPS social worker. I.G. was given a brain scan at Children's Hospital but the parents were not informed that this was done. Father learned of it when he "was reading through all the medical records and they found a germinal matrix hemorrhage, or something like that, on the right side of her head." He wanted I.G. to be transferred to a different hospital because of his dissatisfaction with the way she was being treated at Children's Hospital. His complaints were "[a]bout the staff, their policies, them not keeping us informed, a lot of negativity on their part." He was

displeased "[t]hat if us, as parents, that we could stay there, spend the night there, but we would have to wake up by 6:30 in the morning. And if I did not wake up by 6:30 in the morning, I would be banned for good. So that just made me not stay there anymore for fear of being banned."

Father testified that he never interfered with I.G.'s medical care, never refused the doctors permission to treat her, and never interfered with their medical decisions. The only statement he made about her care was to ask that she be treated "kind and gentle." He was not present when I.G. was discharged from the hospital because he was attending a training session for his work. He told the social worker about the conflict and tried to have the discharge time changed but it was not. He had not had any disagreements or confrontations with any of I.G.'s healthcare providers since the petition had been filed, nor had any of the agencies where she was being seen told him he was not welcome. He testified that he would allow a public health nurse to come into his home to see I.G.

Father testified that he had admitted himself to a mental health rehabilitation program in March 2008, reporting to staff that he had "thoughts of killing himself by jumping [off] bridge and drown[ing] in river." He testified that he went to the program because he "was homeless and didn't have any money." He admitted that he told the personnel that he had suicidal feelings and "felt hopeless." When he was discharged from the program on March 18 he was not prescribed any medications. The discharge notes from the mental health center state that father was "Doing well. [No] thoughts of harming self or others. Alert and oriented to time, place and self. Knows and has a good plan to stay out of hospital. Feeling hopeful." He was given an appointment for a psychiatric follow up on March 24 but did not attend the appointment. He testified that he had taken medication for depression and for his schizoaffective disorder in the past, but had not taken any medications for those conditions since 2007.

The record contains a September 6, 2008 letter, written a few days before the conclusion of the jurisdictional hearing, from a nurse who had observed the parents interacting with I.G. She stated that she "observed both parents caring for [I.G.], which

included feeding, changing diapers, consoling, as well as asking appropriate questions related to pain management and expected plan of care for their child. [Father] knows [I.G.'s] routine, knows how to thicken her feedings, and is knowledgeable as to her medication . . . side effects and dosing. Both he and mother . . . are attentive to their baby's cues and demonstrate the ability to care for her needs. Both parents have asked appropriate questions regarding their child's surgery and care post-operatively, as well as expectations before and after discharge."

At the close of evidence, the agency asked the court to amend the petition to conform to proof by deleting the allegations that I.G. was medically fragile, had ongoing breathing problems, and was at risk for failure to thrive, and that the mother needed education and training relating to the minor's medical needs. The agency asked the court to add an allegation that father had "been diagnosed with and/or has self-reported post traumatic stress disorder, schizoaffective disorder, and major depression and is not currently receiving mental healthcare for these issues since April 2008."

The court began an explanation of its views with the statement that "[t]his is a difficult and unusual case in that we have here two parents who are clearly extraordinarily devoted to their new baby. They have shown this with the extraordinary efforts they have made to track and follow this child's health situation in great detail. And it's also clear to me that both of the parents are intelligent and seem to understand what's going on. And yet I can't help but really worry about what would happen if this court were not to take jurisdiction and continue to have the agency supervise and provide some services to make sure that the kind of things that happened at Children's Hospital didn't end up repeating. And the reason that I'm worried that there's a real chance that these kinds of dynamics might repeat is what the parents said to me today. Mother is taking this . . . onto herself. She's saying that it was her being under stress that caused the difficulties with the staff at Children's Hospital. And the father, while it's real clear that he cares really a lot about this child and would do anything to protect her, at least as he sees fit to protect her, hasn't really shown me much insight into what happened here, what led to

the removal so that the two of these things together, the fact that the father isn't fully addressing what's been going on here, not making that connection, and the mother taking this all on herself and seeing no involvement of the father in the difficulties, to me, that's a danger sign, that the whole dynamic that got set up at Children's resulted in the child not . . . receiving proper care."

The court continued that as to the allegations of domestic violence, while there was no evidence or suggestion of physical abuse, "[t]here are some indicators that are present in this relationship, controlling features, the abusive language, the putdowns, as well as the sort of self-blaming on the part of the person who is being put down and abused. Those all point to an abusive relationship that's extremely unhealthy, not only for the two parents, but in the long run for the child as well. And so for these reasons, I am going to take jurisdiction."

The court modified the petition as requested by the agency. It also added the allegation of "inability of parent or guardian to provide regular care due to the parent's mental illness," and that "Father has been diagnosed with Post-traumatic Stress Disorder, major depression, schizoaffective disorder, and has been in treatment for these conditions since April of this year." The court adjudged I.G. a dependent child and ordered that she "reside in the home of mother . . . provided father does not reside in the home." The court ordered that "the child welfare worker will have discretion to remove that condition once [father] has completed a psychological evaluation and is following through with any suggested treatment and that both parents are addressing the issue of domestic violence . . . . Once those things are in place, then the child welfare worker can allow the parents to be together in the home." The court also ordered father to obtain a psychological evaluation. Mother and father separately timely noticed appeals from that order.

Discussion

Standard for jurisdiction[4]

"Proof by a preponderance of evidence must be adduced to support a finding that the minor is a person described by Section 300." (§ 355, subd. (a).) We review a juvenile court's finding of jurisdiction for substantial evidence. "In a challenge to the sufficiency of the evidence to support a jurisdictional finding, the issue is whether there is evidence, contradicted or uncontradicted, to support the finding. In making that determination, the reviewing court reviews the record in the light most favorable to the challenged order, resolving conflicts in the evidence in favor of that order, and giving the evidence reasonable inferences. Weighing evidence, assessing credibility, and resolving conflicts in evidence and in the inferences to be drawn from evidence are the domain of the trial court, not the reviewing court. Evidence from a single witness, even a party, can be sufficient to support the trial court's findings." (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 450-451.)

"However, substantial evidence is not synonymous with *any* evidence. [Citations.] A decision supported by a mere scintilla of evidence need not be affirmed on appeal. [Citation.] Furthermore, '[w]hile substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; *inferences that are the result of mere speculation or conjecture cannot support a finding* [citations].' [Citation.] 'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.' " (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393-1394.)

The allegations that are the basis of the juvenile court's jurisdictional orders in this case were made under section 300, subdivision (b), which gives the juvenile court

[4] There is little question that there was insufficient evidence concerning mother to create jurisdiction. However, "a jurisdictional finding good against one parent is good against both. More accurately, the minor is a dependent if the actions of either parent bring her within one of the statutory definitions of a dependent." (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 397.)

jurisdiction "if the child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse."

" 'The statutory definition consists of three elements: (1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) "serious physical harm or illness" to the minor, or a "substantial risk" of such harm or illness.' [Citation.] The third element 'effectively requires a showing that at the time of the jurisdiction hearing the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur). [Citations.]' [Citation.] Section 300, 'subdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial risk* of *serious physical* harm or illness.' " (*In re David M.* (2005) 134 Cal.App.4th 822, 829.)

"In determining what constitutes a substantial risk of serious physical harm, some general guidance may be drawn from subdivision (a) of section 300, which uses the same language to authorize jurisdiction where '[t]he minor has suffered, or there is a substantial risk that the minor will suffer, serious physical harm inflicted nonaccidentally upon the minor by the minor's parent or guardian.' For purposes of that subdivision, 'a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the minor or the minor's siblings, or a combination of these and other actions by the parent or guardian which indicate the child is at risk of serious physical harm.' (§ 300, subd. (a).)" (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 823.)

The conditions supporting jurisdiction must exist at the time of the jurisdictional hearing. Although "past events can aid in a determination of present" threat of harm, even past harmful conduct, much less conduct in the past that was not harmful to the minor, is

insufficient. (*In re Melissa H.* (1974) 38 Cal.App.3d 173, 175.) "While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm. [Citations.] Thus the past infliction of physical harm by a caretaker, standing alone, does not establish a substantial risk of physical harm; '[t]here must be some reason to believe the acts may continue in the future.' " (*In re Rocco M., supra,* 1 Cal.App.4th at p. 824, fn. omitted.) "[P]revious acts of neglect, standing alone, do not establish a substantial risk of harm; there must be some reason beyond mere speculation to believe they will reoccur." (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 565.) "Under subdivision (b) . . . the child does not remain a dependent child of the juvenile court under that subdivision if he or she is no longer at risk of suffering physical harm or illness. It follows, then, that dependency jurisdiction is not warranted under subdivision (b) if, at the time of the jurisdiction hearing, there no longer is a substantial risk that the child will suffer harm." (*In re Carlos T.* (June 5, 2009, B207604.) __ Cal.App.4th __ [2009 DAR 8047, 8049].)

Respondent's lengthy appellate brief seeks to justify the assertion of jurisdiction here by reference to essentially four factors: father's intemperate behavior while the prematurely newborn infant was still in the hospital, perceived threats of domestic violence, father's mental health, and mother's alleged developmental disability. While these factors—and from the court's comments when asserting jurisdiction, apparently the third factor in particular—understandably explain the juvenile court's concern for the minor's welfare without some oversight and supervision, the record simply does not disclose a significant risk of harm to the minor. Moreover, as we point out below, the assertion of jurisdiction is not the only means by which precautionary oversight can be exercised. The record unquestionably does not contain the clear and convincing evidence necessary to support the dispositional order removing the minor from the household in which the father resides. (§ 361, subd. (c).) Though a closer question, there is not even

substantial evidence of a current threat to the child's safety sufficient to justify the imposition of jurisdiction. [5]

Father's intemperate hospital behavior

The agency relies in part on father's behavior towards nurses and social workers in the hospital to support the jurisdictional finding. Father indisputably behaved inappropriately with both the nurses and the social workers while I.G. was in the hospital. He told one social worker that he would not allow anyone in the house who did not speak Spanish even though both he and mother are fluent English speakers. However, the social worker also testified that father had later recanted, and there was no evidence that any social worker or medical provider had in fact been excluded after I.G. was released from the hospital. Father testified that he had told the agency's child welfare worker "that she was welcome to come to [his] home and visit with" I.G. He testified that he would allow an occupational therapist to visit I.G. following her surgery, and that he would allow a public health nurse into the home. This testimony was not disputed and there was no evidence of any contrary statements or behavior by father after I.G. left the hospital.

The agency points to the incident in which father removed the tape holding the breathing tube from I.G.'s face, arguing that father was endangering the infant's health.

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[5] Both parents argue that the trial court erred in denying their motion, styled as a motion for a directed verdict, after the agency had concluded presenting its evidence. Section 350, subdivision (c) provides "At any hearing in which the probation department bears the burden of proof, after the presentation of evidence on behalf of the probation department and the minor has been closed, the court, on motion of the minor, parent, or guardian, or on its own motion, shall order whatever action the law requires of it if the court, upon weighing all of the evidence then before it, finds that the burden of proof has not been met. That action includes, but is not limited to, the dismissal of the petition and release of the minor at a jurisdictional hearing . . . ." The Attorney General argues that a motion for a directed verdict is not appropriate in a dependency case. However, the parents' motion clearly was intended as a motion to dismiss based on insufficient evidence and was properly made under section 350, subdivision (c). Since the court proceeded to a full hearing on the issue of jurisdiction, we need not consider whether the motion to dismiss should have been granted.

While father may have used poor judgment in taking it upon himself to reposition the tube when he thought the tape was bothering the infant's eye, he did so at a time of great stress when he believed the nursing staff was not responding to what he viewed as a potentially harmful situation. In all events, this was a single incident in which no harm was done, there were no recurrences of similar situations, and I.G. is now out of the hospital and by all reports was thriving at the time of the jurisdictional and dispositional hearing.[6]

Father's failure to treat hospital staff respectfully is surely subject to criticism, but is hardly an indication that he threatens to cause harm to his child. At the time, father was frustrated because he felt that hospital staff persistently failed to keep him and mother informed of the infant's condition and of the tests and procedures that were being performed on her. He was upset over the refusal to make acceptable arrangements for him to sleep at the hospital where he could keep a constant eye on his child's treatment. His method of responding is not to be condoned, but nothing in the record suggests that his behavior threatened harm to I.G. or that such a scenario is likely to recur.

Domestic violence

The agency also cites its concern over potential domestic violence between father and mother. In *In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1131-1132, the petition alleged that mother had hit the minor hard enough to bruise his face. The appellate court found this allegation insufficient to sustain jurisdiction because "mother admitted and regretted" the incident and it was therefore unlikely to recur. (*Id.* at p. 1134.) The mother in *Alysha S.* had obtained a restraining order against father at one point and it was alleged that " 'The father was physically abusive and violent to the mother and was arrested and incarcerated for domestic violence against the mother.' " (*In re Alysha S. supra,* 51 Cal.App.4th at p. 396.) It was also alleged that " 'mother observed the father to touch the

[6] The cryptic allegations concerning father's interference with the receipt of Medi-Cal benefits were not explored at the hearing and the record contains no evidence that I.G. was denied either care or benefits.

minor on the buttocks and vaginal area in a way that seemed to her inappropriate.' " (*Ibid.*) The appellate court held that "Even construing this pleading expansively to allege more than one instance of violence against the mother, it does not allege that the violence was perceived by or affected the child and did not establish a 'failure to protect' her." (*Id.* at p. 398.) The court likewise found the allegation of sexual abuse insufficient to sustain jurisdiction because "the pleading does not allege that any such touching continued . . . and therefore the petition, over one year later, does not establish that the minor is currently at any risk of serious physical harm." (*Id.* at pp. 398-399.)

In the present case, there is no evidence that father has ever engaged in physical violence towards mother, much less towards the minor.[7] Mother denied that father had ever struck her and the hospital staff and social workers who observed them in times of stress confirmed that there was never any violence. Certainly there is evidence to support the juvenile court's observation that father's "controlling features, the abusive language, the putdowns, as well as the sort of self-blaming on the part of" mother "point to an abusive relationship that's extremely unhealthy, not only for the two parents, but in the long run for the child as well." Such behavior may be symptomatic of problems in the relationship and father undoubtedly would benefit from services to address those issues. However, the record also reflects that at the time of the jurisdictional hearing father was receiving precisely those services. A letter dated September 3, written by a counselor at a program entitled Youth and Family Services Infant Toddler Program states that father had enrolled himself in the program expressing "interest in accessing services to support his transition into parenthood in light of numerous stressors that include but are not

[7] The agency refers repeatedly in its appellate brief to father's criminal history, although the social worker attached no importance to this history in her reports to the court, and the juvenile court did not rely on it in finding jurisdiction. The incidents cited by the agency are that father "was in prison in Oklahoma for robbery" in 2001 and for firearm possession in 2004, and that he was arrested in 2004 "for willfully resisting a public officer . . . and for possession of controlled substance for sale." The agency also points out in its brief to this court that the mother too has a criminal record: for theft and for disturbing the peace.

limited to[] having to provide care to his medically fragile infant daughter [I.G.], contending with the impact that the current CPS intervention has had on his mood functioning, as well as addressing the relational difficulties between himself and his daughter's mother . . . ." Mother, father, and I.G were attending weekly sessions and father "has shown the capacity to engage fully in treatment and has not missed any appointments to date."[8] Thus, father's outbursts towards mother, while of concern, fall short of supporting a finding that his temper creates a substantial risk of harm to I.G.

Father's alleged mental illness

The agency also argues that father's diagnoses of post-traumatic stress disorder, major depression and schizoaffective disorder create a substantial probability of harm to I.G. The agency "has the burden of showing specifically how the minors have been or will be harmed and harm may not be presumed from the mere fact of mental illness of a parent." (*In re Matthew S*. (1996) 41 Cal.App.4th 1311, 1318.) "Harm to the child cannot be presumed from the mere fact of mental illness of the parent and it is fallacious to assume the children will somehow be 'infected' by the parent. The proper basis for a ruling is expert testimony giving specific examples of the manner in which the mother's behavior has and will adversely affect the child or jeopardize the child's safety. . . . [¶] . . . [¶] . . . It cannot be presumed that a [parent] who is proven to be 'schizophrenic' will necessarily be detrimental to the mental or physical well-being of her offspring. . . . The trial court's duty in this situation is to examine the facts in detail. The social worker must demonstrate with specificity *how* the minor has been or will be harmed by the parents' mental illness." (*In re Jamie M.* (1982) 134 Cal.App.3d 530, 540-542, fns. omitted.)

[8] Father also states that "[h]e was also assisting the county as a member of two different groups working on mental health issues," although the cited handwritten notes do not appear to support this assertion, Father also cites a letter from a program called "BestNow!", stating that father had "been selected to participate in the BestNow! CLASP2008 training program." The letterhead indicates that CLASP is an acronym for Consumers Learning About Service to Peers, Alameda County Network of Mental Health Clients.

In *Heather P.* the mother challenged a finding of continued risk of detriment at a review hearing. (*In re Heather P.* (1988) 203 Cal.App.3d 1214, disapproved on other grounds in *In re Richard S.* (1991) 54 Cal.3d 857, 866, fn. 5.) The mother had a "history of mental problems," a "very transient lifestyle," mental illness, and a suicide attempt. Although mother had complied with the service plan, obtained a stable residence, and begun working in a church nursery, the social worker considered returning the child to her mother detrimental because the mother's psychologist, although noting progress, did not give her a positive evaluation for neglect or endangerment. Another psychologist's report noted that the mother did "not exhibit adequate, nondetrimental or healthy parenting capabilities." (*Id.* at pp. 1219-1223, 1227, 1229.) The Court of Appeal held that the first psychologist's opinion was insufficient to justify a detriment finding because it provided merely "general statements" about the mother's psychological condition, but did not demonstrate "with specificity *how* the minor would be harmed." The other psychologist's statements were held to be "outdated" and "not the type of evidence which could be deemed credible and of solid value and from which the juvenile court could conclude that [the] minor's physical or emotional well-being would be threatened if she were returned" at the time of the review hearing. (*Id.* at pp. 1229-1230.)

In this case, father's diagnoses were made several months before I.G. was born. Father had voluntarily sought treatment for himself in a mental health program and at the time of his discharge in March 2008 he was described as being mentally sound—"Doing well. [No] thoughts of harming self or others." He was not prescribed medications. Although the program had scheduled a follow-up examination that had not occurred, there was no testimony, expert or otherwise, that father had continuing mental health issues. To the contrary, the social worker testified that her "concern with myself and Social Services has been getting more information about the father's emotional stability given the referrals that got us into the case regarding the father's behavior since his daughter's birth." She conceded that "the parents have been positive and appropriate in caring for their child." "For me, what's missing is really not having enough information

about the father's mental health component, not knowing what his—if he's in treatment, what the follow-up—what the recommendations are . . . if he's had previous hospitalizations, what prompted the hospitalization in March. I don't have any information about what kind of treatment the father's getting. So I can't—you know, that's a big piece for me."

The social worker's lack of information does not provide a basis for finding the father's mental health a threat to the safety of the minor. As the court observed in *David M.,* "Certainly, it is possible to identify many possible harms that *could* come to pass. But without more evidence than was presented in this case, such harms are merely speculative." (*In re David M., supra,* 134 Cal.App.4th at p. 830.) The court continued, "The evidence was uncontradicted that David was healthy, well cared for, and loved, and that mother and father were raising him in a clean, tidy home. Whatever mother's and father's mental problems might be, there was no evidence those problems impacted their ability to provide a decent home for David." (*Ibid.*) The identical observation can be made in this case; at the time of the jurisdictional hearing I.G. was healthy and thriving, and both parents had learned the skills needed to care for her. If father has any lingering mental health issues, there is no evidence they threaten the safety of I.G.

Mother's alleged developmental disability

There were allegations in the reports that mother has a developmental disability. These allegations were not substantiated by any testimony or other evidence. Mother was reported to have "spaced out" while feeding the newborn I.G., and it was reported that "the mother does not seem to grasp the feedings." Those observations were made at the time the petition was originally filed. By the time of the jurisdictional hearing, all agreed that mother had learned how to properly feed the baby. In its findings the trial court specifically observed that "it's . . . clear to me that both of the parents are intelligent and seem to understand what's going on." This falls far short of substantial evidence that I.G. is at risk of future harm because of mother's alleged developmental disability. In *In re Janet T.*, (2001) 93 Cal.App.4th 377, 384, the court found insufficient to support a

petition under section 300, subdivision (b) a psychologist's finding that " 'there were times when [mother's] thinking became a little tangential and/or disorganized.' " The allegations in this case amount to no more than that, and in any event do not relate to the situation at the time of the jurisdictional hearing.

Removal order

Father argues that the trial court erred in removing I.G. from his custody. As relevant here, section 361, subdivision (c) provides that "A dependent child may not be taken from the physical custody of his or her parents . . . unless the juvenile court finds clear and convincing evidence [that] [¶] (1) [t] here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody." As explained above, the record does not contain substantial evidence, let alone clear and convincing evidence, that I.G. was in substantial danger of being harmed by her father. Were jurisdiction to be upheld, this dispositional order would require revision. (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 169; *In re Cheryl H.* (1984) 153 Cal.App.3d 1098, 1111-1113, disapproved on other grounds in *People v. Brown* (1994) 8 Cal.4th 746, 763.) However, since we conclude that the order imposing jurisdiction cannot stand, the dispositional order necessarily falls with it.

Conclusion

The juvenile court considered this to be "a difficult and unusual case" and we find it to be no less so on appeal. The juvenile court understandably saw in the evidence signs of concern and declared I.G. a dependent of the court in order to provide continuing oversight over her care. While we do not fault the court's solicitude for the well-being of the fragile minor, we cannot agree that the evidence establishes a substantial risk of harm to the child without the court's intervention. The events that are most troubling occurred well before the jurisdictional hearing and under circumstances that are not likely to recur. The evidence is uncontradicted that by the time of the jurisdictional hearing, I.G. was

being well cared for and was thriving. While concern may have been justified, making the child a dependent of the court was not.

Imposing the court's jurisdiction is not the only means by which the authorities may exercise protective surveillance. "In any case in which a social worker after investigation of an application for petition . . . determines that a child is within the jurisdiction of the juvenile court or will probably soon be within that jurisdiction, the social worker may, in lieu of filing a petition or subsequent to dismissal of a petition already filed, and with consent of the child's parent . . . , undertake a program of supervision of the child." (§ 301, subd. (a).) This program is intended to "ameliorate the situation which brings the child within, or creates the probability that the child will be within, the jurisdiction of Section 300 by providing or arranging to contract for all appropriate child welfare services . . . ." (*Ibid.*) Despite father's initial negative reaction to the intervention of public authorities, his subsequent statements and behavior suggest a willingness to accept their review and assistance. In all events, it is clear that such an alternative was never offered to the parents.

We recognize that some 10 months have elapsed since the juvenile court entered the jurisdictional and dispositional order that we review. [9] On the court's own motion, we take judicial notice of the Superior Court register of actions in this matter, which discloses the entry of several restraining orders against father while this appeal has been pending. The record before us does not disclose the circumstances leading to the entry of those orders, much less whether those circumstances provide a factual basis on which jurisdiction may now be justified. It should therefore be clear that we express no opinion as to what action, if any, may be appropriate in light of events that have occurred

[9] We echo the frustration expressed by the court in *Nicholas B.* eight years ago: "Given the lengthy time frame involved in the normal appeal of jurisdictional and dispositional orders, we question the efficacy of our review and the adequacy of any remedy until the Legislature provides for expedited review of jurisdictional and dispositional orders in these extremely important dependency cases." (*In re Nicholas B., supra,* 88 Cal.App.4th at p. 1137, fn. 13.)

subsequent to the entry of the September 8, 2008 order. As the court observed in *Alysha S.*, "Our conclusion does not mean the [agency] cannot try again." (*In re Alysha S., supra,* 51 Cal.App.4th at p. 400.) Moreover, if the agency believes that the circumstances are such that the juvenile court's control should not be permitted to lapse, there will be time for it to petition the juvenile court for appropriate relief after the issuance of this opinion before issuance of the remittitur.[10] We hold only that on the record before us there is insufficient evidence to support the jurisdiction of the juvenile court.

Disposition

The jurisdiction and disposition orders are reversed.

_____
Pollak, J.

We concur:

_____
McGuiness, P. J.

_____
Siggins, J.

[10] Should there be further contested proceedings in the juvenile court, we recommend that consideration be given to the appointment of counsel to represent the minor.